

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Application of PropSF, LLC for authority to operate as a scheduled Vessel Common Carrier between points in Redwood City, Alameda City, San Rafael, Emeryville, Oakland, San Leandro, and San Francisco and to establish a Zone of Rate Freedom

A. 15-08-014
(Filed August 17, 2015)

Application of Tideline Marine Group, Inc.
DBA Tideline Water Taxi for Vessel Common Carrier Authority to Provide Unscheduled, On-Call Water Taxi Service and Scheduled Service Between Points in the San Francisco Bay and its Navigable Tributaries

A.15-12-021
(Filed December 23, 2015)

SUR-REPLY BRIEF OF TIDELINE MARINE GROUP INC.

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Dated: June 21, 2016

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Pursuant to the Assigned Commissioner’s Scoping Memo and Ruling (“Scoping Memo”) dated May 17, 2016, Tideline Marine Group, Inc. DBA Tideline Water Taxi (“Tideline”) submits its Rebuttal Brief in the above captioned consolidated proceeding. The Scoping Memo requires that Sur-Reply Briefs be filed by June 21, 2016.¹ This brief is timely filed.

I. INTRODUCTION

On June 14, 2016, Blue and Gold Fleet, L.P, (“B&G”) and the Water Emergency Transportation Authority (“WETA”) filed reply briefs in this proceeding.² Both parties express concerns over future proceedings before the Commission rather than this matter. At least with respect to Tideline, WETA and B&G ask for conditions to which Tideline has already agreed and neither WETA nor B&G object to the service Tideline proposes in its application.

¹ Scoping Memo, p. 4

² Interestingly, PropSF, LLC (“PropSF”) did not file a reply brief.

Tideline has agreed to the conditions that WETA has requested and has no objection to serving notice to B&G and WETA of any future applications filed by Tideline. Tideline is not proposing to serve any landing points that would conflict with B&G's operations, and agreed with WETA long ago that it would seek Commission approval in a separate application for authority to serve any additional landing sites or service routes.

While Tideline disagrees with WETA's and B&G's summary of the Commission's current policy regarding competition in the vessel carrier industry, any such disagreement need not, and should not,³ be resolved in this proceeding since it does not affect the outcome of it. WETA and B&G's claim that the Commission should protect existing providers against any new operation that may harm their business, but neither claim that granting Tideline's application would have such an effect.⁴

In its Reply Brief, an unverified pleading,⁵ B&G's improperly advances last minute⁶ claims that Tideline has operated without authority; Tideline, however, affirms its belief that all the services that it has provided were authorized by Tideline's for-hire authority.⁷ Moreover, while Tideline filed the instant application largely as a direct result of the passenger demand for an alternative service between Berkeley and San Francisco, Tideline also filed this application in part to moot any question with regard to the classification of its pre-arranged operations. (The application also seeks authority to provide non-prearranged, clearly common carrier, service under Section 1007.)

³ Except in a generic rulemaking in which all affected entities may participate, the Commission should not resolve a question of law or a policy issue that is not necessary to resolution of the matter before it. *See Wild Goose Storage, LLC vs.; Pacific Gas and Electric Company*, D. 07-07-026 (July 26, 2007) [2007 Cal. PUC LEXIS 335].

⁴ Since Tideline's largest vessel has a capacity of only 43 passengers, the absence of any such claim is not surprising.

⁵ Tidelines briefs in the matter have either been verified by an officer of Tideline or accompanied by a declaration of that officer.

⁶ *See* discussion at page 7, *infra*.

⁷ While the availability of the vessel for pre-arranged service was, during certain time periods in the past, pre-determined, Tideline questions whether such a condition constituted "scheduled" service as that term is associated with true common carrier service. Neither Section 211(b) nor Section 1007 make any referenced to a "schedule" and the service provided remained "pre-arranged" only.

II. TIDELINE HAS AGREED THAT THE COMMISSION SHOULD IMPOSE CERTAIN CONDITIONS ATTACHED TO THE AUTHORITY TO OPERATE AS A VESSEL COMMON CARRIER

Nothing in Tideline’s application or pleadings suggests that the proposed service is inconsistent with WETA’s and B&G’s operations.⁸

A. Tideline has already addressed WETA’s concerns regarding the conditions that the Commission should impose on Tideline’s Certificate of Public Convenience and Necessity

WETA states that “[t]he current common-carrier service proposals of PROP and Tideline do not impede or impair any of WETA’s present operations or future plans.”⁹ Tideline concurs. Tideline’s service (provided in small vessels) was designed to avoid conflicting with the operations of large ferry services on San Francisco Bay. Indeed, Tideline’s services would complement WETA’s fulfillment of WETA’s principal statutory mandate, emergency response planning.¹⁰ Moreover, as Tideline explained in its application and reiterated in pleadings,¹¹ Tideline has provided its services pursuant to an existing Landing Rights Agreement License with the Port of San Francisco, which Tideline obtained after participating and winning a Request for Proposal (“RFP”) process carried through by the Port.¹² Again, the goal of Tideline’s service is to complement other water transportation offerings in the San Francisco Bay.

WETA cautions that “[u]nlimited authorization of [PropSF and Tideline’s applications] to undertake ferry services on San Francisco Bay could, however, have such

⁸ At page 2 of its Reply Brief, B&G refers to itself as an “applicant.” B&G is not an applicant in this consolidated docket.

⁹ WETA’s Reply Brief, p. 13.

¹⁰ The docks west of Fisherman’s Wharf are inadequate landing sites for large vessels. Tideline’s smaller vessels are perfectly suited for those docks. Under Tideline’s current contract with the Port of San Francisco, Tideline has landing locations west of WETA’s Pier 41 terminal. Specifically, those docks are located at Hyde Street Pier (Port owned property) and East Harbor at Fort Mason Center (which include Park and Recreations property and the San Francisco small-boat Harbor at Chrissy Field). Tideline has never docked its vessels at any of WETA’s facilities. However, during WETA’s board meetings (meeting minutes are publicly available), Tideline has stated its intent to work with WETA in any emergency response or general service capacity to fill the needs to the general community.

¹¹ See Tideline’s Application, p. 12; Tideline’s Reply Brief, p. 3.

¹² See Tideline’s Reply Brief, p. 3 (“PropSF points out that the Port of San Francisco identified a need for water taxi service and sought to identify and authorize a small vessel provider, a water taxi service, to operate at the Port. PropSF, however, does not mention the fact that the Port pursued that desire through a Request for Proposal (“RFP”) process at the conclusion of which Tideline was the successful applicant.”).

adverse impacts for WETA.”¹³ As expressed in multiple pleadings, Tideline is not seeking “unlimited” authority to operate as a vessel common carrier. Tideline agreed long ago that it will be required to request additional authority from the Commission to (1) add additional landing sites or service routes for common carrier service, (2) add any additional vessels to its common carrier operations that are larger than the largest forty-three passenger vessel currently proposed, and (3) reduce its base fares below ZORF.¹⁴ Tideline and WETA jointly advised the original hearing examiner of that agreement last April.¹⁵

B&G’s concerns seem focused not on any issue that needs to be resolved in this docket but on those that could arise in future proceedings. Any issues raised by those future applications,¹⁶ however, should be resolved then. Resolution in this docket is premature.

At the conclusion of its Reply Brief, B&G urges the Commission to (1) adhere to its policy¹⁷ to consider impacts on existing carriers when approving this (and future) applications; (2) require applicants to serve notices for changing essential terms to other vessel carrier operators;¹⁸ (3) if a rulemaking is opened, maintain the notice described in numeral (3) as a requirement; and (4) impose reasonable conditions to protect existing operators.¹⁹

With regard to the first and fourth points, Tideline disagrees with B&G’s interpretation of existing Commission policy (see Section III, below). But the Commission need not resolve that disagreement here, where its resolution does not affect the outcome of the proceeding. B&G does not assert that Tideline’s proposed service will have an effect on B&G’s existing operations. To the contrary, B&G states that Tideline’s “proposed service between the indicated landing points would not cause significant diversion of passengers from Blue & Gold Fleet’s existing Commission-authorized passenger ferry service routes.”²⁰ The Commission does not need to determine whether it should consider the effect of the application on B&G’s existing

¹³WETA’s Reply Brief, p. 13.

¹⁴ Tideline’s Response to WETA’s Protest, p. 2. Tideline has also agreed to adhere to the terms that PropSF suggested in its Opening Brief. *See* Tideline’s Reply Brief, pp. 5-6.

¹⁵ *See* April 11, 2016 email from Thomas MacBride and Martin Mattes to Elizaveta Malashenko (attached), which makes reference to Tidelines Reply to WETA’s Response to the Application.

¹⁶ Tideline agrees to serve future applications on B&G.

¹⁷ As noted below, Tideline questions the extent to which any such “policy” exists today. The extent of any such policy need not be resolved in this docket since no incumbent has alleged that any adverse impact would arise from Tideline’s proposed service.

¹⁸ B&G specifically asks that it be served with future applications by Tideline and PropSF (a proposal to which Tideline does not object.)

¹⁹ B&G Reply Brief, pp. 12-13.

²⁰ B&G’s Reply Brief, p. 7.

operations because B&G states that there will be no effect, an outcome Tideline intended from the outset of this matter.

B&G's fourth point requests the Commission to prohibit Tideline from offering vessel passenger service between landing sites in Marin County and San Francisco. Again, Tideline is not requesting common carrier authority to serve the cities of Marin County. Any Commission order addressing whether Tideline may do so should await a proceeding in which Tideline actually seeks such authority.²¹ If Tideline files an application requesting authority to expand its common carrier service to Marin County, the Commission would have the opportunity to analyze all the facts and consider whether or not competition in that county's landing sites would be in the public necessity and convenience. At this time, the Commission only needs to resolve whether Tideline's proposed service, which will provide a much-needed transportation solution for East Bay-San Francisco commuters, is in the public necessity and convenience. Tideline has abundantly demonstrated that its proposed service meets that criteria.

B&G concurs here,²² and its President has so stated publically.

*Carolyn Horgan, president of Blue & Gold Fleet, Inc., which operates large excursion boats from its base at Pier 41, said she was initially unclear on how water taxis would work along the waterfront. She's become less concerned over the past two years because there's been no accidents between water taxis and excursion boats. There's also been a minimal effect on her business's revenue. "We like to encourage all water transportation because we certainly need it," said Horgan.*²³

B&G also requests (number (2)) that, if Tideline applies in the future to modify its service points, Tideline serve the application on other vessel common carriers, including B&G. Tideline agrees to provide notice to other vessel carriers in future applications to modify the proposed service. Tideline does not believe, however, that a decision in this docket should

²¹ Any order doing so here would be plainly premature and could not survive scrutiny pursuant to Sections 1757(a)(3) and 1757(a)(4).

²² "The respective applicants have presented a strong case for unmet demand in the East Bay and in the South Bay/Silicon Valley areas, and they should be limited to providing new services connecting those areas and San Francisco." B&G's Reply Brief, p. 11.

²³ THE POTRERO VIEW, *Water Taxis Want to Expand Fleets, Add Landing Sites*, <http://www.potreroview.net/water-taxis-want-to-expand-fleets-add-landing-sites/> (March 2016) (italics added).

prejudge the outcome of a potential rulemaking proceeding, as B&G suggests in its third recommendation (number (3)).

III. TIDELINE DISAGREES WITH WETA’S AND B&G’S SUGGESTIONS THAT EXISTING COMMISSION POLICY PROTECTS INCUMBENTS IN A COMPETITIVE INDUSTRY

Both WETA and B&G contend that existing Commission policy protects incumbents in a competitive industry. While, for reasons set forth above, this issue need not be resolved here, Tideline will briefly state its disagreement with the description of current policy advanced by WETA and B&G.

First, any debate over whether *Avalon Freight Services*,²⁴ or *Harbor Breeze Corp.*²⁵ states current policy has to begin with the recognition that in both cases the Commission elected to not protect the ostensibly threatened incumbent notwithstanding a robust direct case by each incumbent in opposition to the application. Here, as Tideline has noted repeatedly, no party protested Tideline’s application and no party states that any harm will arise if it is granted. (To avoid unnecessary repetition, Tideline incorporates the comments in its Opening Brief regarding these decisions by reference).²⁶

WETA takes issue with the fact that Tideline “cites only a single decision to support this broad claim” (Tideline’s claim that current Commission policy eschews the protection of incumbents’ in competitive transportation markets.). Tideline, however, cited the *Avalon* case because it was a very recent (2016) case that addressed the question. Contested vessel common carrier applications are very rare, in particular applications filed by private applicants competing with other private operators. Moreover, in *Avalon Freight Services*, the Commission’s decision to certify the applicant followed extensive briefing on the issue of competition.

Again, however, nothing in Tideline’s application requires the Commission to harmonize *Avalon Freight Services*, *Harbor Breeze Corp* or any of its earlier decisions in order to grant Tidelines application. WETA’s and B&G’s confirms in their reply briefs that the service Tideline proposes in this proceeding will not affect the existing operations of either WETA or B&G.

²⁴ D. 16-02-034.

²⁵ D. 07-06-026.

²⁶ See Tideline’s Opening Brief, pp. 3-4,

It bears repeating that Tideline's application was and continues to be predicated on the outpouring of demand being expressed for the service Tideline seeks to provide. Tideline's focus is on the residents of the Bay Area who are faced with daily challenge of getting to and from their jobs. Its goal has always been to meet the needs of those people whose needs are not being met by current means of transportation, including current ferry service providers. If incumbents were meeting this need, no application would have been filed since it a business case could not have been made for it.

IV. TIDELINE'S PRIOR SERVICES HAVE BEEN PROVIDED ON A PRE-ARRANGED CHARTER BASIS

B&G did not protest Tideline's application or question Tideline's operational or financial fitness to provide the proposed service. Inexplicably and improperly,²⁷ however, B&G's Reply Brief, an unverified pleading, unaccompanied by any supporting declaration or other documentation, advances allegations regarding Tideline's operations, which require a response from Tideline.

B&G, for the first time in this consolidated docket, raises three instances in which Tideline allegedly operated its vessels as a common carrier without Commission authority: (1) using the *Osprey* to provide *scheduled* passenger transportation between Sausalito and Tiburon and San Francisco in February and March 2015, leading to a the opening of Complaint proceeding No. CIU20150128²⁸ by Commission staff; (2) advertising offering *scheduled* commuter services in early July 2015, during the closure of Doyle Drive, the principal means of access to the Golden Gate Bridge;²⁹ and (3) operating point-to-point passenger service between

²⁷ If B&G harbored any doubts about Tidelines fitness, B&G should have filed a protest to Tideline's application raising its concerns. It did not. B&G appears to only be raising unfounded questions regarding fitness now because it disagrees with Tideline's views with respect to the largely moot issues surrounding the Commission's policy on competition in proceedings where an application is contested on economic grounds (i.e. harm to an incumbent.)

²⁸ Obviously, this number does not refer to any formal Commission proceeding.

²⁹ During the closure of access to the Golden Gate Bridge, the General Manager of the St. Francis Yacht Club chartered Tideline service between two private landing locations: The St. Francis Yacht Club in SF and Sausalito Yacht Club in Sausalito. The service provided to members who were transported from one club to the other on a pre-arranged (no walk-on) basis.

Sausalito and Tiburon and San Francisco during the Super Bowl week.³⁰ B&G also mentions a cease and desist letter that was issued by Commission staff, but that Tideline never received.³¹

B&G provides no factual support for its assertions. More importantly, B&G does not offer a compelling reason why it failed to raise these “concerns” during the protest period or in an Opening Brief. B&G is simply, but improperly, employing its Reply Brief to advance allegations neither raised in a properly filed protest (to which Tideline could have replied) or in an Opening Brief (to which Tideline would have been afforded 14 rather than 7 days to reply).

The Commission should disregard B&G’s untimely and undocumented factual claims. Pursuant to the Rules of Practice and Procedure, a protest “must state the facts or law constituting the grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. . . .The protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application.” (Rule 2.6); B&G filed no such Protest. In briefs, “[f]actual statements must be supported by identified evidence of record” (Rule 13.11); B&G’s Reply Brief fails to do so.

However, Tideline clarifies that in the three instances to which B&G alludes, Tideline was operating on a charter, “on-call” carrier pursuant to its for-hire authority. All the trips that B&G alleges to have been provided on a common carrier scheduled basis, were in fact pre-arranged, charter operations. The fact that Tideline solicited pre-arranged passengers by marketing its services does not change that fact. Tideline recognizes that a dispute may exist with regard to whether unscheduled, “on-call” service is charter or common carrier service. To the extent that there is any doubt regarding Tideline’s pre-arranged service, Tideline filed this application in part to make sure that its operations are in full and absolute compliance with the Commission’s regulations.

Even if the Commission decides to entertain B&G’s statements, B&G is expressing concerns about operations that are completely unrelated to the proposed common

³⁰ B&G’s Reply Brief, pp. 8-9.

³¹ Tideline’s address, and that of its General Counsel, have remained unchanged since the company’s formation. Tideline’s conversations with Mr. Hooks principally focused on Mr. Hook’s understanding (ultimately determined to be incorrect) that Tideline’s “for-hire” authority had expired and Tideline’s “hop-on, hop-off” loop service. Tideline made a point of maintaining an open line of communication with Mr. Hooks.

carrier service between Berkeley and San Francisco.³² Once Tideline obtain the authority requested in A. 15-12-006, B&G may always complain to the Commission if, in B&G's view, Tideline is operating as a vessel common carrier without the proper authority of the Commission (e.g., using landing points not previously authorized by the Commission). Tideline intends to strictly adhere to the terms and conditions that the Commission establishes in this proceeding. B&G's speculation that Tideline will not do so in a hypothetical future is not a reason to deny or delay the approval of the application.

V. CONCLUSION

Neither WETA's nor B&G's Reply Briefs express concerns regarding the existing application or the proposed service. Both parties expressed concerns regarding potential issues that may arise in future proceedings. Future litigation over additional points or expansion of Tideline's service is not a reason to deny or further delay the approval of Tideline's application.

Tideline has already agreed to adhere to all the conditions that WETA and B&G recommend. While Tideline disagrees with WETA's and B&G's characterization of the Commission's current policy regarding competition in the vessel carrier industry, this proceeding does not require the Commission to address that issue.

³² "Blue & Gold Fleet is reasonably concerned that once it receives CPCN authority from the Commission, Tideline may return to siphoning passengers away from Blue & Gold Fleet's scheduled passenger service between Sausalito and Tiburon and San Francisco." B&G's Reply Brief, p. 9.

Respectfully submitted June 21, 2016 at San Francisco, California.

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By /s/ Thomas J. MacBride, Jr.

Thomas J. MacBride, Jr.

Attorneys for Applicant Tideline Marine Group,
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3659/001/X182775.v2

VERIFICATION

I, Taylor Lewis, state that I am the Chief Executive Officer of Tideline Marine Group, DBA Tideline Water Taxi ("Tideline"), and am authorized to make this verification on its behalf. I have read the foregoing Sur-Reply Brief and know its contents. The statements in the Sur-Reply Brief are true of my own knowledge, except as to matters therein that are stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed this 21st day of June, 2016, at Sausalito, California.

By  _____
Taylor Lewis

ATTACHMENT

RGutierrez

From: TMacBride
Sent: Thursday, June 16, 2016 7:26 AM
To: LElkins
Subject: FW: Re. A. 15-12-021 ; Tideline Marine Group Inc
Attachments: Response of Tideline to Late Filed Response of WETA.pdf

From: TMacBride
Sent: Monday, April 11, 2016 1:54 PM
To: Malashenko, Elizaveta I.
Cc: Mattes, Martin [MMattes@Nossaman.com]
Subject: Re. A. 15-12-021 ; Tideline Marine Group Inc

Dear Ms. Malashenko,

As we indicated in our voicemail message Applicant, Tideline Marine Group ("Tideline") and San Francisco Bay Area Water Emergency Transportation Authority ("WETA") are the only two parties to A. 15-12-021 which was filed last December. Tideline and WETA have resolved the few differences between them with respect to the proposed service. The agreement is as set forth at page 2 of the attached RESPONSE OF TIDELINE MARINE GROUP TO LATE FILED RESPONSE OF WETA filed February 25, 2016. Specifically, Tideline agreed that:

"(I)f Application 15-12-021 is granted, Tideline will do none of the following without seeking further authority from the Commission through a formal application. First, Tideline will not add additional landing sites or service routes. Second, Tideline will not add any additional vessels to its operations that are larger than the largest forty-three passenger vessel currently proposed. Finally, Tideline will not reduce its base fares below those proposed in the application. Tideline would retain the flexibility 'to add additional frequencies to its proposed service schedules.'"

With that understanding, the parties request that A. 15-12-021 be approved at the earliest possible time so that the proposed service, which enjoys broad support, may commence. While there is a pending motion for party status by WETA, we cannot see why that motion cannot simply be deemed moot given the parties' resolution of this matter.

Thank you for your consideration.

Tom MacBride for Applicant
Martin Mattes for WETA

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